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Sexual harassment offensive conduct continues

By Arthur F. Silbergeld and Aya Z. Elalami

When Brian Cranston stuffed a pillow around his waist to play LBJ in "All the Way" on Broadway, the script about President Johnson's jawboning to get Title VII of the 1964 Civil Rights Act passed into law only told some of the legislative history. Another actor did play the Congressman from Virginia, Mr. Smith, who inserted "sex" as a protected class, expecting that none of his House colleagues would vote to pass the legislation which he ardently opposed. But no one played Eleanor Roosevelt, then on the President's Commission on the Status of Wo-men, who opposed including "sex" because she feared the Virginia Congressman was right and the protections accorded to persons in other categories would be lost. And no one played Rep. Green of Oregon, who opined that it would be discrimination for a college seeking to hire a dean of women or a family seeking a nurse for an elderly parent to only advertise for women.

All three were wrong: the legislation passed.

Despite derision from some of his former Senate colleagues, LBJ happily signed it. Title VII became the law, but with no discussion at all about what Congress intended the term "sex" to include. Although difficult today to grasp, it took 23 years before the U.S. Supreme Court would conclude that sexual harassment was a form of gender discrimination. In *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986), the Court acknowledged that harassment is a form of sex discrimination, concluding that both quid quo pro harassment and conduct that creates a hostile, offensive, and intimidating workplace environment are actionable. The Court directed that employers could defend against such claims by having a policy against it, investigating claims, and when allegations were substantiated, taking immediate and appropriate corrective action. *Meritor Savings* held that an employer may be liable if it knew or should have known of the unlawful conduct and failed to take steps to prevent the conduct from recurring.

As the 60th anniversary of Title VII approaches, it is worth looking back at the judicial standards that have evolved, California's efforts to end prohibited conduct, and at recent cases involving nuanced circumstances and other decisions demonstrating that hostile and offensive behavior persists.

An employee can show a hostile working environment simply by demonstrating that the harasser's conduct was sufficiently severe or pervasive, without offering evidence of psychological damage. *Harris v. Forklift Sys. Inc.*, 510 U.S. 17 (1993); *Miller v. Dep't of Corr.*, 36 Cal. 4th 446, 462 (2005). The *Harris* decision found that, in most instances, the harassment must be shown to affect one's ability to work. The conduct must not only be offensive to the victim, but to a reasonable person. Not all harassment rises to the level of a legal violation: the conduct must be sufficiently pervasive, as measured by the severity, regularity, and whether it is physically threatening or humiliating or merely a single offensive utterance. *Etter v. Veriflo Corp.*, 67 Cal. App. 4th 457 (1998); *Lyle v. Warner Bros. Television Prods.*, 38 Cal. 4th 264, 283 (2006).

California law on the subject may be more strict than federal. For example, federal cases allow an employer an affirmative defense when it establishes that it exercised reasonable care to prevent harassment and proves that the victim unreasonably failed to mitigate or to avoid the harm by failing or unreasonably delaying reporting the unlawful conduct. *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). However, the California Supreme Court ruled that failing to undertake the "avoidable consequences" of failing or delay in reporting may only reduce damages, but is not grounds for avoiding liability. *State Dept. of Health Services v. Superior Ct.*, 31 Cal. 4th 1026 (2003).

An employer may be held strictly liable for a supervisor's harassment of an employee, regardless of whether the conduct was authorized, forbidden by, or known to the employer. *State Dep't of Health Servs*, 31 Cal. 4th at 1042; *Taylor v. Nabors Drilling USA, LP,* 222 Cal.App.4th 1228, 1236-1237 (2014), citing *Health Services*, supra, 31 Cal. 4th at pp. 1040-1041. Addressing who is a "supervisor" for purposes of holding an employer liable for a supervisor's harassing conduct, the U.S. Supreme Court has suggested that the offending individual must have authority to impose a tangible job action against an employee, such as hiring or firing. However, under the State test, an employee having authority to direct the day-to-day activities of employees is a "supervisor," even if lacking authority to take tangible actions such as hiring, firing, transferring or disciplining. *Chapman v. Enos*, 116 Cal. App. 4th 920 (2004). Under FEHA, an employer is strictly liable for harassment by a supervisor. However, an employer is only strictly liable under FEHA for harassment by a supervisor "if the supervisor is acting in the capacity of supervisor when the harassment occurs." *State Dep't of Health Services*, supra, at p. 1041, fn. 3.

Courts have ruled that, under Title VII, a supervisor cannot be held personally liable. *Mercado-Aponte v. Med Health Hospice, Corp.*, 203

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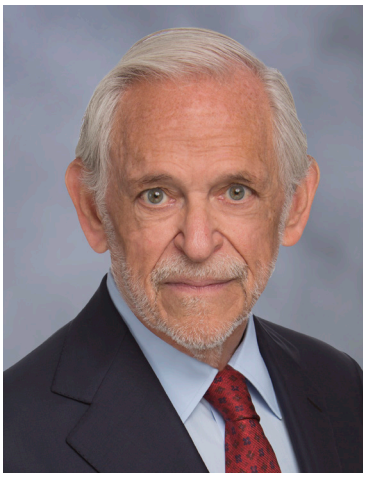

F. Supp. 3d 240, 241 (D.P.R. 2016); *Fantini v. Salem State Coll.*, 557 F.3d 22, 29 (1st Cir. 2009). However, in California, a supervisor may be personally liable for harassing a coworker. *Janken v. GM Hughes Elecs.*, 46 Cal. App. 4th 55 (1996). If the conduct is outside the scope of his job, the employer has no duty to indemnify the perpetrating employee for the costs of defending against a claim or paying damages.

Complying with EEOC and California guidelines requires an employer to investigate any known or suspected incident of harassment, and numerous cases address the sufficiency of the employer's efforts. In *Steiner v. Showboat Operating Co.*, 25 F.2d 1459 (9th Cir. 1994), for example, a casino operator took no steps to investigate claims by one of its blackjack dealers until she filed a charge with a state agency. The court regarded the failure to investigate until forced to by the state as essentially condoning the conduct. In California, simple reference to the investigative procedure without an investigation sufficient to end the harassment is not enough. *Bradley v. Cal. Dep't. of Corr. & Rehab.*, 158 Cal. App. 4th 1612 (2008).

Some employers retain an outside law firm to conduct its investigation, but if the employer as an affirmative defense asserts that its law firm conducted a thorough inquiry, the results of the investigation become an issue and the attorney-client privilege does not apply. *Wellpoint Health Networks, Inc. v. Super. Ct.*, 59 Cal. App. 4th 110 (1997). A leading California decision held that, to be thorough, the investigation must involve appointing a disinterested, trained person; interviewing all relevant witnesses; documenting what each witness said; asking open-ended questions; maintaining the confidentiality of witnesses; inviting further communications; determining whether any witness has an ax to grind; promptly notifying the alleged harasser and providing an opportunity to explain; trying to resolve issues of credibility when witness's statements conflict; and giving the alleged harasser a final opportunity to comment on the conclusions. *Silva v. Lucky Stores, Inc.*, 65 Cal. App. 4th (1998); *See also Serri v. Santa Clara Univ.*, 226 Cal. App. 4th 830, 875 (2014).

An employer's "equal opportunity offender" defense sometimes prevails, as when it shows that the woman claiming to have been harassed was an equal participant in sexually explicit discussions, asks males about their sex life, and openly discusses her own, belying any claim that the language of others was offensive. On the other hand, a female's use of sexual language is not a waiver of the right to assert unwelcomed conduct, and as one federal court put it, "That women say 'fuck' at work does not imply that they are inviting every form of sexual harassment." *Jensen v. Eveleth Tucolma Co.*, 824 F. Supp. 847 (D. Minn (1993)).

Determining when the facts developed require corrective action and what corrective action is appropriate is not always easy, but is always subject to second-guessing by a court or jury. A merely unpleasant working environment that includes occasional vulgar language tinged with sexual innuendo may not violate Title VII. *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428 (7th Cir. 1995); Lyle, 38 Cal. 4th at 280. But verbal abuse amounting to obscene name-calling directed at a particular female may be pervasive and actionable. *Burns v. McGregor Electronic Industries*, 995 F.2d 559 (8th Cir. 1992). The measure of immediate and corrective is whether it was sufficient to prevent the hostile working environment or offensive conduct from recurring. For example, requiring counseling, and on recurrence, further counseling, has been held inadequate.

Expecting to stem a tide of harassment litigations flooding the state courts, effective Jan. 1, 2019 the California Government Code reduced from employers of 50 or more to employers of 5 or more the obligation to provide two hours of training every two years to any supervisor working in California. The training must cover issues of harassment, discrimination, retaliation, bullying, and bystander intervention, and newly hired or designated supervisors must be trained within 6 months. Moreover, after that date employers of 5 or more must provide training to all non-supervisory employees every two years and newly-hired employees within six months. Cal. Gov't Code § 12950.1.

Progress has been made from the day when a federal appeals court would opine that, on accepting employment, a female assumes the risk of walking into a male-dominated environment in which a virtual "lexicon of obscenity" prevails. *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir, 1986). Nonetheless, recent cases illustrate, on the one hand, that courts continue to confront employer inaction in offensive harassment and hostile work environments, and, on the other, that courts are finding unlawful offensive work environments in unusual circumstances.

Employers continue to face liability when they fail to take immediate and appropriate corrective action. For example, in a recent decision, the plaintiff alleged that the defendant allotted fewer funds to its Hispanic ministry, giving less funding, allocating fewer resources, and providing less desirable facilities to its Hispanic employees. In February 2021, a White male coworker made offensive, sexually-oriented comments to Plaintiff, including telling Plaintiff that he viewed pornography and asking her if she had sex with her husband. Plaintiff was offended and distressed and complained to defendant's Executive Pastor of Ministry about sexual harassment. The court found that plaintiff's sexual discrimination was sufficiently alleged where plaintiff claimed that she repeatedly complained of her coworker's sexually oriented comments to defendant's attention, and defendant failed to take any corrective action after stating that it would. *Castillo v. Well Cmty. Church*, No. 1:21CV01460ADABAM, 2022 WL 17631612, at *4 (E.D. Cal. Dec. 13, 2022).

In *Sharp v. S&S Activewear, L.L.C*, No. 21-17138 (9th Cir. 2023), seven women and one man alleged that the defendant permitted its managers and employees to routinely play sexually graphic, violently misogynistic music throughout its large warehouse. The plaintiff alleged that the music and related conduct created a hostile work environment. The Ninth Circuit vacated the lower court's dismissal under the rationale that the music was offensive to both men and women. It directed the federal district court to reconsider the sufficiency of plaintiffs' pleadings and whether aural or visual, harassment must be directed at a particular plaintiff in order to pollute a workplace and justify a Title VII claim. Further, it asked the district court to reconsider whether Title VII bars a claim when the conduct is offensive to multiple genders.

Not every instance of offensive conduct is enough to support a harassment claim. The court in *iFoster v. ScentAir Techs., Inc.* found plaintiff failed to plead a plausible hostile work environment sexual harassment claim because the only instance of alleged abusive conduct relating to sex is found during the course of a single conversation, and therefore, there was not a concerted pattern of sexual harassment of a repeated, routine, or a generalized nature and was not sufficiently severe or pervasive as to alter the conditions of her employment. No. 13-CV-05772-TEH, 2014 WL 2603995, at *3 (N.D. Cal. June 10, 2014).

And an employer may escape the jaws of strict liability if it can demonstrate that the supervisor and the plaintiff had a close personal relationship and that the offensive conduct did not occur at the workplace or during normal working hours. In a recent case, the court found that the plaintiff and supervisor had a long-standing personal and private relationship and had exchanged hundreds of text messages over the years preceding the offensive incident. The court noted that once a supervisor is found to have committed harassment, strict liability applies and principles of respondeat superior do not apply. However, principles of respondeat superior are relevant in determining liability in the first instance. Even if the status of the supervisor is not at issue, whether he was acting in that capacity in forwarding a photo of his genitals required further analysis. If he was not, then whether the employer could properly be held liable for that conduct would need to be determined. The question was, in the court's view, whether the harassment arose from a completely private relationship unconnected with the employment. The court upheld the trial court's grant of summary judgment on the sexual harassment claim, determining that the employer's supervisor was not acting in a supervisory capacity when he sent the plaintiff lewd pictures. *Atalla v. Rite Aid Corp.*, 89 Cal. App. 5th 294 (2023).

People come to work to earn a living. When harassment occurs, everyone is at risk.